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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Clark-Bader, Inc. d/b/a)
TMC Long Distance, Inc.,)
Complainant,)
)
v.)
)
Pacific Bell Telephone Company,)
Defendant)

CC Docket No. 93-161
File No. E-89-85

To: Honorable Walter C. Miller
Administrative Law Judge

REPLY TO COMMENTS OF THE COMMON CARRIER BUREAU

Complainant Clark-Bader, Inc. d/b/a TMC Long Distance ("TMC"), by its attorneys, hereby submits the following "Reply" to the "Comments of the Common Carrier Bureau" that were filed on August 2, 1993, in response to a "Petition for Clarification" filed by Defendant Pacific Bell Telephone Company ("PacBell") on July 15, 1993 ("Petition"). As detailed herein, this Reply is limited to the new matters raised by the Bureau in its Comments.

The Bureau's Comments must be taken as an attempt to expand the scope of the relief requested by PacBell in its Petition, by suggesting for the first time that PacBell's procedural request for witness immunity actually interjects serious issues of misconduct on the part of TMC. The Bureau has not, however, bothered to seek to enlarge the issues designated for hearing in this proceeding to include any such issue against TMC.

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Therefore, it is necessary that TMC respond to the Bureau's Comments.¹ In support whereof, the following is shown.

1. PacBell's Petition requested the Presiding Judge clarify his ruling set forth in the Prehearing Order, FCC 93M-426, released June 30, 1993 ("PHO") that denied requests that two witnesses be given immunity from prosecution so that their depositions could be taken. PacBell originally made its requests in the predesignation phase of this proceeding. PacBell's Petition was limited to a discussion of the proper standard applicable to a request for immunity under federal law, and to a request that PacBell be permitted to renew its request for immunity at the prehearing conference scheduled for September 21, 1993.²

¹ As the Bureau's Comments were filed on August 2, 1993 (some 18 days after PacBell's Petition was filed), it appears that the Bureau may have treated PacBell's Petition as a request (under Section 1.294(c)(1)) to clarify the issues that were designated in the HDO, despite the fact that the petition as filed by PacBell contains no discussion whatsoever of the designated issues. In the instant Reply, TMC makes no comment on the merits of PacBell's Petition. Rather, TMC seeks to address the new matters raised by the Bureau's Comments. Because the new matters affect TMC specifically, a reply to the new matters is permitted under Section 1.294(c)(1). However, in view of the fact that a reply is not ordinarily permitted where a Section 1.294(b) interlocutory motion is filed, TMC is submitting concurrently herewith a "Motion for Leave to File Reply" with respect to the instant pleading. In the event that it is determined not to allow TMC to respond to the new material raised in the Bureau's Comments, TMC respectfully requests in the alternative that the matters raised in the Bureau's Comments be stricken as being beyond the scope of the matters raised by PacBell in its Petition.

² TMC submits that PacBell's Petition is properly considered a request for an interlocutory ruling under Section 1.294(a) and (b) of the Commission's Rules. TMC accordingly filed its Opposition to the Petition on July 23, 1993, pursuant to the provisions of Section 1.294(b) of the Rules. TMC's Opposition

2. In responding to PacBell's Petition, the Bureau did not confine its comments to the narrow procedural issue raised by PacBell. Instead, it is apparently suggesting (at page 2 of its Comments) that the Presiding Judge undertake an inquiry into issues that have not been designated and hence are not now properly raised against TMC. The Bureau apparently believes it is appropriate for the Presiding Judge to consider, along with the limited issue of the need for witness immunity, an entirely different subject: viz., TMC's "credibility" and instances of "impropriety," which it is gratuitously suggested will have an unspecified impact on "the Commission's processes." Comments, p. 2.

3. In commenting on the conditions under which the Presiding Judge should consider whether or not to grant immunity, the Bureau errs by assimilating into its comments the assumption that the issues about which the immunized testimony may address are already part of this proceeding. But with no prima facie submission establishing facts upon which such issues, were they to be added, could be properly designated, the Bureau's Comments engage in the unwarranted assumption that such issues are already part of this hearing, when in fact they exceed the scope of the

addressed only the matters raised in the Petition, and demonstrated that clarification of the PHO in the form requested by PacBell is not necessary at this time, and in fact would have an adverse impact on the orderly conduct of the hearing schedule as established by the Presiding Judge.

designated issues and are therefore procedurally and substantively improper.

4. The issues as designated in the HDO do not include any issues specifically inquiring into whether TMC has made any misrepresentations to the Commission and/or has abused the Commission's processes. No party to this proceeding has timely filed a petition to enlarge the issues to include any issues concerning TMC's conduct in this proceeding.³ As the time in which to timely file a petition to enlarge elapsed over two weeks ago, the Bureau and PacBell cannot now request that an issue be added to this proceeding under Section 1.229(a).⁴ Nor are there specific allegations of fact, supported by sworn affidavits of persons having personal knowledge (as required by Section 1.229(d) of the Rules) to justify a request for addition of such misconduct issues against TMC.

5. The Bureau recognizes in its Comments that the HDO did not specifically designate any misconduct issues against TMC on these subjects. Comments, footnote 2. The Bureau's mere

³ Under Section 1.229(a) of the Rules, motions to enlarge issues must be filed within 15 days of the publication of the hearing designation order in the Federal Register. As the HDO in this proceeding was published in the Federal Register on July 12, 1993, motions to enlarge issues were required to be filed on July 27, 1993. TMC timely filed a "Motion to Clarify and/or Enlarge Issues" on that date.

⁴ If PacBell supposedly has had information in its possession concerning the so-called falsification of records by TMC since before the motion for immunity was originally filed on March 6, 1991, surely no claim can be made of "new facts or facts newly discovered" so as to permit a late-filed motion to enlarge issues under the provisions of §1.299(b) (3) of the rules.

suggestion that the designated issues "properly encompass" an undefined inquiry into the "credibility of TMC's submission." cannot substitute for a properly filed motion. Nor may it overcome the Presiding Judge's own observation that the need for such testimony has not been shown and may not be able to be shown. Memorandum Opinion and Order, FCC 93M-485, at ¶ 3, CC Docket No. 93-161, (July 21, 1993).

6. That a party seeking to add issues must establish a prima facie case for enlargement is critical for two reasons: first, the Commission is not to waste administrative hearing time and limited resources on issues that are purely speculative and have no basis in fact, and second, the party against whom the issues are requested must be provided with an adequate opportunity to respond to the request on a substantive basis before a decision is made by the Presiding Judge as to whether a sufficient showing has been made to warrant the exploration of such issues at hearing.

7. The situation with which TMC is faced with at this juncture demonstrates the dangers inherent in the manner in which this hearing has thus far been conducted. TMC submits that it is being victimized by the simple assertion by PacBell of the need for immunity, and by unsupported allegations concerning "falsification" of records that PacBell raised indirectly in a procedural motion filed over two years ago. The Bureau's Comments strongly suggest that the bare assertion of the need for immunity and the alleged basis therefor have been wrongly

dignified by the Bureau as if they were specific and factually supported. A sense is being created in this case that TMC "is guilty until proven innocent" of misrepresentation and an abuse of the Commission's processes.

8. Of even more concern to TMC is that the Bureau's apparent prejudgment has more than likely been extended to capture the Presiding Judge as well. In orally advising of his decision to dismiss the notices to take depositions TMC filed August 2, 1993, the Presiding Judge admonished TMC's counsel that he would not permit TMC to "jerk the Commission's processes around like it had the Common Carrier Bureau for the last several years" or words to that effect. Since then, the Presiding Judge has denied, on procedural grounds, all efforts of TMC to engage in discovery essential to its case.⁵

9. While this impression remains yet to be more thoroughly substantiated, the rulings of the Presiding Judge repeatedly emphasize form over substance and are clearly based on an erroneous, but preconceived view of the record in this case.⁶

⁵ The Presiding Judge's rulings, if allowed to stand, in effect will deprive TMC of its ability to prepare its case properly. In effect, as the Presiding Judge must be aware, by undercutting TMC's efforts to engage in needed discovery due to a formalistic application of the procedural rules where no prejudice to any party has been shown, the Presiding Judge is wittingly or unwittingly defaulting the case to the Defendant.

⁶ In the Presiding Judge's most recent ruling, denying a subpoena duces tecum for Mr. C.L. Cox, twice the Presiding Judge refers to the four years the Judge believes the parties have had "to perfect their trial preparations" (Memorandum Opinion and Order in CC Docket 93-161, FCC 93M-506, Aug. 5, 1993 at n.3 and ¶ 4.) Nothing could be further from the truth. As will be explained in a subsequent filing, in exacting detail, the parties have in fact

At this juncture, not one bit of evidence has been introduced to date concerning this alleged "falsification" of documents; only PacBell's requests that witnesses require immunity and its non-specific and unsupported assertions that these witnesses might have some relevant testimony on this issue have been put forth. Ironically, applying the Judge's own ruling that "the thousands of pages of documents that have been lodged with the Common Carrier Bureau ... are not part of the evidentiary record in CC Docket No. 93-161 " (Emphasis in original)⁷, none of the documents relating to the need for immunity or the alleged basis therefor are part of the record in this docket. Yet, TMC contends such documents already have had a significant and continuing adverse effect on TMC's presentation of its case.

10. Undisclosed, unsworn non-testimony, and statements by counsel cannot be considered sufficient to constitute a prima facie showing sufficient to warrant an enlargement of the issues. TMC has not been provided an opportunity to address either the credibility of these witnesses or the speciousness and prejudice of the "evidence" that these witnesses may or may not supply, and also has not been allowed to present its evidence that demonstrates that its submissions to the Commission have been lawful, valid, and good-faith attempts to document its claims. Nevertheless, TMC is being treated as already adjudged guilty,

had only since the designation order was issued less than two months ago "to prepare for trial."

⁷ Memorandum Opinion and Order, FCC 93M-493, CC Docket No. 93-161, at n. 1 (July 26, 1993).

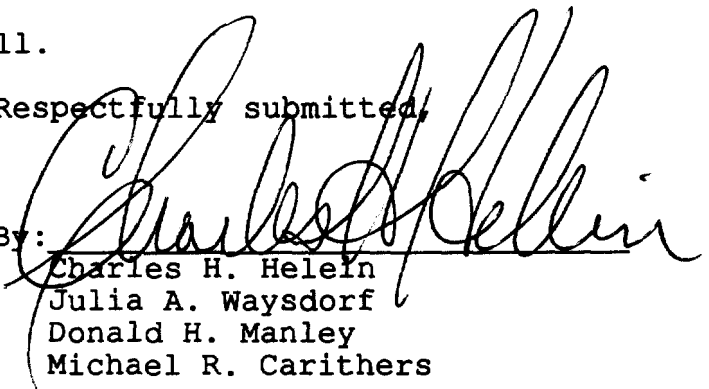
and is being systematically denied the right either to effectively present its case or to defend itself.

11. More importantly, the judgment against TMC is all the more pernicious because it is unannounced and undeserved. Yet it nevertheless appears to lie at the root of recent decisions that deny TMC its fundamental rights to prove its case, thereby awarding PacBell the decision in this case by default.

12. For these reasons, TMC respectfully requests that the Presiding Judge reject the Common Carrier Bureau's suggestion set forth in its Comments that a far-ranging inquiry be conducted in this hearing as to alleged misconduct by TMC in its prosecution of its complaint against PacBell.

Respectfully submitted,

By:



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CERTIFICATE OF SERVICE

I, Suzanne Helein, hereby certify that on this 9th day of August, 1993, I caused a true and correct copy of the foregoing "Reply to Comments of the Common Carrier Bureau" in CC Docket No. 93-161, File No. E-89-85, to be sent to the following in the manner indicated:

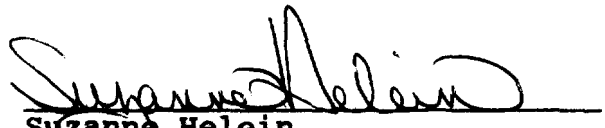
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